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No. 07-421

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In The
Supreme Court of the United States

VILLAGE OF OLDE ST. ANDREWS, INC.;
WKB ASSOCIATES, INC.,
Petitioners,

v.

FAIR HOUSING COUNCIL, INC.;
CENTER FOR ACCESSIBLE LIVING, INC.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF IN OPPOSITION

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INTRODUCTION

Under the Fair Housing Act, it is unlawful to discriminate in the sale or rental of a dwelling, or "to otherwise make unavailable or deny" a dwelling, because of disability.[1] 42 U.S.C. §3604(f)(1). "Discrimination" based on disability is defined by the Act to include (but is not limited to) a failure to design and construct covered multi-family dwellings that are accessible to persons with disabilities. 42 U.S.C. §3604(f)(3).

Private fair housing organizations like respondent Fair Housing Council have standing under the Act to sue on their own behalf for injuries they have sustained. *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 (1982). They suffer "injury in fact" whenever the defendant's practices impair the organization's activities, including the organization's noneconomic interest in encouraging open housing, and cause any "drain on the organization's resources." *Id.*

Petitioners erroneously claim that this case requires resolution of a split in the circuits on a narrow post-*Havens* question of standing under the Act, specifically whether "pre-litigation expenditures" are sufficient to sustain standing under the Act. Pet. 16. Even if there were a split on this issue – which

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[1] The Act uses the term "handicap" instead of the term "disability," but both terms have the same legal meaning. *See Bragdon v. Abbott*, 524 U.S. 624, 631 (1998). The Brief in Opposition uses the term "disability," which is more generally accepted.

there is not, *see infra* – this case does not present that question for resolution. As the Court of Appeals recognized, the Fair Housing Council here satisfied even the most stringent standard for fair housing agency standing adopted by any circuit.

To bolster their purported conflict, petitioners are forced to mischaracterize the record. Although petitioners baldly assert that there is "no evidence" to sustain the Fair Housing Council's standing, Pet. 15, both the district court and the Court of Appeals found otherwise. The record is filled with sworn testimony of agency harm sufficient to meet the *Havens* standard. Ordinarily this Court will decline to review factual determinations upon which both lower courts have agreed. *Branti v. Finkel*, 445 U.S. 507, 512 n. 6 (1980); *Goodman v. Lukens Steel Co.*, 482 U.S. 656, 665 (1987).

Nor is there any reason for this Court to consider the lower court's application of the Fair Housing Act's statute of limitations in this case. It is premature to address that issue because the Courts of Appeals have not yet had sufficient opportunity to consider it. The decision below is the first appellate decision to address the applicability of the Act's statute of limitations in design and construction cases. Moreover, because the statute of limitations does not affect two of the petitioner WKB's three housing developments involved in this case – and does not affect petitioner Village of Olde St. Andrews, Inc., at all – resolution of that question will not dispose of this litigation. Finally, contrary to petitioners' suggestion, the Court of Appeals' analysis is correct.

STATEMENT OF THE CASE

A. Background.

Petitioner WKB Associates, Inc.,[2] is a developer and builder of multi-family dwellings covered by the Fair Housing Act. Between 1993 and 2001, WKB constructed three condominium developments in Jefferson County, Kentucky: (1) Greenhurst Condominiums ("Greenhurst"); (2) the Village of Olde St. Andrews ("Olde St. Andrews"); and (3) the Village of Deer Creek ("Deer Creek"). Pet. App. 40a – 44a. Greenhurst was completed in 1995, and consists of 156 dwelling units. Olde St. Andrews was completed in 1999, and consists of 112 dwelling units. Deer Creek was completed in 2001, and consists of 64 dwelling units. *Id.*

It is undisputed that the dwelling units and common areas constructed by WKB at these developments do not comply with the accessibility requirements set forth in the Fair Housing Act. Some features of non-compliance were conceded by WKB at trial (TR. 52, 58, 139, 196, 258, Apx. pp. 811, 817, 898,

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[2] The Petition for Writ of Certiorari is also purportedly filed on behalf of "Village of Olde St. Andrews, Inc." Pet. ii. But no judgment was granted against that entity, and it did not appeal the trial court's final judgment. It was not a party to the appeal below. *See, e.g.*, Pet. App. 4a, 8a (noting appeal only by defendant WKB); May 19, 2005 Notice of Appeal (Apx. 124-125); April 26, 2005, Memorandum and Order (Apx. 102-104). It does not, therefore, have standing to file a petition in this Court. *Penfield Co. v. SEC*, 330 U.S. 585, 589 (1947); S. Ct. R. 12.6.

955),[3] while others were specifically identified by the district court after hearing all the evidence at trial. (R. 76 Memorandum, Opinion and Order, Apx. pp. 83-92). The substantial level of non-compliance may be attributable to the fact that WKB's architect and owners claimed to have "never heard of" the Fair Housing Act. (Brown at TR. 210-211, 224, Apx. pp. 969-970, 983; Koch at TR. 292, Apx. p. 1051).[4] None of the court's findings of non-compliance were challenged on appeal.

On July 22, 1998, respondent Fair Housing Council, Inc. ("the Council"), discovered that WKB's construction of dwellings at the Village of Olde St. Andrews did not comply with the Act. Pet. App. 102a – 105a (Deposition of Tony Baize, "Baize Dep."). Thereafter, testers[5] and investigators employed by the Fair Housing Council and respondent Center for

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[3] Petitioners did not include in their Appendix any portion of the Trial Transcript in this case. References to the Trial Transcript can be found in the Joint Appendix filed in the Court of Appeals below.

[4] WKB observes that local building code officials failed to say anything about compliance with the Fair Housing Act. Pet. 2-4. Such officials are not, however, responsible for enforcement of the Act. Compliance is the responsibility of individual builders, designers, and owners.

[5] Testers are individuals who, without an intent to rent or purchase a home or apartment, pose as renters or purchasers for the purpose of collecting evidence of unlawful housing practices. *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 373 (1982). Here, respondents' testers visited the building sites in person, and if violations seemed apparent, follow-up testers were sent to conduct more detailed inspections. Pet. App. 110a (Baize Dep. at 21).

Accessible Living, Inc., conducted an investigation of the Village of Olde St. Andrews. Specifically, the Council visited and inspected the development; took and processed digital photos of the development; trained, supervised, and debriefed testers; conducted research into the ownership of the development; located and reviewed the original design plans and construction permits; and performed other tasks. Pet. App. 71a-74a (Plaintiff's Responses to Defendants' First Interrogatories, No. 3); Pet. App. 26a fn. 4. The Council also spent a substantial amount of staff time interviewing owners of dwellings at Olde St. Andrews. Pet. App. 88a – 98a (Plaintiff's Responses to Defendants' First Interrogatories, No. 15). The Council and the Center determined that Olde St. Andrews was not accessible to people with disabilities as required by the Fair Housing Act, and on October 6, 1998, filed their original Complaint.[6]

Soon thereafter, the Council devoted additional resources to investigating WKB's other two developments, Greenhurst and Deer Creek. The Council determined that those developments, too, were non-compliant. *Id.* They promptly amended their complaint to include Greenhurst and Deer Creek.

The investigation of WKB's non-compliant housing developments diverted the Council's resources away from other projects. Pet. App. 125a – 129a, 135a, 141a, 151a (Baize Dep. at 36, 40-44, 70, 76-77, 118); Pet.

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[6] In addition to WKB and Village of Olde St. Andrews, Inc., the complaint named Standard Country Club, Inc., Sabak, Williams and Lingo, Inc., and Ken Brown, architect, as defendants. These defendants were dismissed prior to trial.

App. 71a – 74a (Plaintiff's Responses to Defendants' First Interrogatories, No. 3). The Council diverted resources from its normal activities, including: conducting, attending, and speaking at fair housing seminars; providing tester training; providing advice and referral services to the public; publishing the *National Fair Housing Advocate* and other publications; and conducting an insurance testing project. *Id.*[7]

In addition, the Council initiated several new projects to undo the damage to its mission caused by WKB's non-compliance. Pet. App. 71a – 74a (Plaintiff's Responses to Defendants' First Interrogatories, No. 3). It stepped up presentations at local and regional events specifically focused on disability issues, increased the number of accessibility tests, and recruited additional testers with disabilities. *Id.* The Council also "got a lot more involved with accessibility and getting the word out about accessibility in new construction." Pet. App. 130a (Baize Dep. at 48-49). It would have focused its limited resources on education and outreach had it not been working on this investigation. Pet. App. 137a (Baize Dep. at 72).

In his deposition, the Council's Executive Director, Tony Baize, explained in detail how WKB's non-compliant dwelling units frustrated the Council's mission. Part of the Council's mission is to educate the

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[7] Respondent Center for Accessible Living also diverted resources to this investigation. It recruited persons who used wheelchairs and had other disabilities to conduct the testing. It participated in meetings with the Council's representatives. Pet. App. 104a – 105a (Baize Dep.).

community about the non-discrimination requirements of the Fair Housing Act, and to ensure full access to persons with disabilities. Pet. App. 116a – 119a (Baize Dep. at 27-30). The construction of non-compliant units communicated the opposite message to the community, *i.e.*, that this type of construction is permissible and that persons with disabilities "cannot have access to this new house even though [we told them] they should have access to it." Pet. App. 123a – 124a (Baize Dep. at 34-35). "[U]ntil the defects in these buildings are corrected, we see them as ongoing frustration to our mission to eradicate discrimination in housing." Pet. App. 124a (Baize Dep. at 35). The Council's frustration-of-mission damages were further documented in Answers to WKB's Interrogatories. Pet. App. 68a – 71a (Plaintiff's Responses to Defendants' First Interrogatories, No. 2).

B. Course of Proceedings.

After the parties' cross motions for summary judgment were denied, *see* 250 F. Supp. 2d 706 (W. D. Ky. 2003), a bench trial was conducted before District Judge John Heyburn on June 2-3, 2003. As part of the trial proceedings, and without objection from either party, the district court expressly incorporated and relied upon the facts, testimony, and evidence submitted to it as part of the summary judgment proceedings (TR. at 5-6, 22, 34, 194, Apx. pp. 764-765, 781, 793, 953). In addition to the summary judgment evidence, the judge heard live testimony from plaintiffs' expert witness, several wheelchair users, owners of the condominiums, fair housing accessibility testers, the projects' architect, and the defendant's

corporate representative. The judge also viewed in person the dwellings and public areas at issue.

On June 18, 2003, the district court issued its findings of fact and conclusions of law. The court found substantial areas of non-compliance in the public and common use areas, and in the individual dwelling units, at all three developments. It ordered specific relief for 29 of the violations. It denied the respondents' request for the imposition of punitive damages against WKB, and continued further proceedings for consideration of an appropriate remedial order. A final remedial order was ultimately entered on April 26, 2005. An appeal followed.[8]

WKB argued on appeal that neither the Kentucky Fair Housing Council nor the Center for Accessible Living had organizational standing to sue under the Fair Housing Act. WKB argued that the agencies' investigation of its non-compliance was insufficient to confer standing. The appellate court rejected WKB's argument as to the Council's standing, finding that the Council had proved a sufficient injury-in-fact. Pet. App. 23a – 26a. The court noted with approval evidence in the record that the Council had diverted resources from other activities, and that it had suffered lost opportunity costs by having to investigate WKB's developments. Pet. App. 24a.

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[8] WKB attempted to appeal the district court's findings of fact and conclusions of law prior to the entry of a final appealable order. The Sixth Circuit dismissed WKB's first appeal for lack of appellate jurisdiction. *See* Order of December 7, 2004, Case Nos. 04-5749/5801 (6th Cir.).

In contrast, the court found that the Center for Accessible Living lacked standing to sue. The court concluded that the Center had engaged in no activity other than identify individuals who might serve as potential testers. Pet. App. 26a – 27a.

With respect to the statute of limitations, the Court of Appeals held that the trigger for the limitations period "will depend on the circumstances of each case." Pet. App. 32a. It held that the trigger for the statute will depend not on the date of completion of construction, but on the date there is an act connected with the "sale or rental" of that non-compliant dwelling. Pet. App. 33a.

> In the context of the construction and design of multifamily dwelling units that are inaccessible to disabled individuals, *the discriminatory act occurs during the sale or rental of that unit.* Thus, once a unit as been sold or rented, the discriminatory act is complete.

Pet. App. 31a (emphasis supplied). It also held that, because the continuing violation doctrine applies to claims brought under the Fair Housing Act (citing *Havens*), the statute of limitations is not triggered until the last unit in a covered development is sold. In this case, the court affirmed the trial court's ruling that the statute of limitations did not bar the Council's cause of action as to Greenhurst, the housing development completed in 1995, because the last unit was sold within two years of the filing of the complaint. The court's ruling on the statute of limitations affected only the units constructed at Greenhurst. There was no statute of limitations

challenge to the respondents' claims concerning the units being constructed at Olde St. Andrews and Deer Creek.

REASONS FOR DENYING THE PETITION

I. THE RECORD IN THIS CASE PRESENTS NO ISSUE UPON WHICH THE COURTS OF APPEALS ARE IN CONFLICT.

The Petition does not challenge the proposition that private fair housing organizations like respondent Fair Housing Council have standing under the Fair Housing Act to sue for injuries they have sustained. *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 (1982). Ordinarily the question of whether such injuries have been sustained is one of fact, and in this case both the district court and the appellate court found sufficient evidence of agency harm to satisfy the *Havens* standard. *See Branti v. Finkel*, 445 U.S. 507, 512 n. 6 (1980) (noting the Court's "settled practice" of accepting factual determinations in which both the district court and the court of appeals have concurred).

Petitioners erroneously claim that this case requires resolution of a split in the circuits on the narrow question of whether "pre-litigation expenditures" can be sufficient to sustain standing under the Act. Pet. 16. Even if there were a split on this issue – which there is not, see *infra* – this case does not present that question for resolution. As the Court of Appeals recognized, the Fair Housing Council's injury was not limited to "pre-litigation expenditures," and it satisfied even the most stringent standard for fair housing agency standing adopted by

any circuit. There is no basis to resolve a circuit split that is not fairly presented by the record.

A. The Sixth Circuit's Standing Decision Does Not Present Either a "Conflict" Or a Question of Exceptional Importance.

Petitioners claim that this Court should grant the petition because "there is manifest conflict" in the Courts of Appeals about whether "pre-litigation expenditures" are sufficient to satisfy Article III standing. Pet. 16.

In fact, there is no such conflict. To fabricate its purported "conflict," WKB relies on appellate court decisions suggesting that the costs *of litigation* cannot be the *sole* support for the standing of a fair housing organization to pursue litigation (citing *Spann v. Colonial Village, Inc.*, 899 F.2d 24 (D.C. Cir. 1990); *Fair Housing Council of Suburban Philadelphia v. Montgomery Newspapers*, 141 F.3d 71 (3d Cir. 1998); and other cases). Pet. 16-22. WKB then unfairly uses the term "pre-litigation expenditures" as if it is equivalent to the term "litigation costs," and suggests a conflict because respondents here did incur pre-litigation *investigation* costs, including the use of testers.

But the two concepts are not the same, and no circuit court has ever held that the expenditure of time and agency resources to investigate acts of discrimination, including the use of testers, is insufficient to sustain an agency's standing to sue under the Act or Article III. Instead, as the court below explained, the circuit courts differ on the extent to

which they will recognize standing based *solely* on the costs *of the litigation itself.* Pet. App. 16a-17a.

This case does not present that issue, as we show below, and the Sixth Circuit did not disagree with the decisions that petitioners cite.[9] The panel below clearly held that the Sixth Circuit *does* require something more than the expenditure of costs of litigation to support agency standing:

> [W]e require a plaintiff to show some injury that is independent of the costs of litigation . . . . [*HOME, Inc. v. The Cincinnati Enquirer,* 943 F.2d 644, 646 (6th Cir. 1991)] suggests that this Court does not preclude consideration of the costs of litigation when determining standing,

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[9] *Spann*, for example, did not even discuss the nature or extent of any pre-litigation investigation expenditures. The agency plaintiffs in *Spann* based their allegations of standing on the frustration of their corporate missions and the need to increase educational efforts to counteract the influence of the defendants' discriminatory acts. 899 F.2d at 27-31. On this basis, they were found to have standing. Likewise, the Third Circuit in *Montgomery Newspapers* did not hold that a fair housing agency could never rely on pre-litigation investigation costs to sustain its standing to sue. Rather, the Court held that the agency's claimed standing based on its diversion of resources to an independent investigation "fails for lack of proof." 141 F.3d at 78. The Court examined the record and sustained the district court's factual determination that the fair housing agency had not diverted any resources to a bona fide investigation. *Id.* It distinguished *Havens* on the ground that the organization in *Havens* "did something different" as a result of the particular conduct alleged to be illegal – just as the district court and the Court of Appeals found the Council had proved here.

> but additionally requires the plaintiff to prove some type of injury beyond these costs.

Pet. App. 19a. Thus, standing in this case was *not* based solely on the Council's litigation expenditures, and the Sixth Circuit *did* require evidence of agency injury beyond the costs of litigation. Pet. App. 22a – 26a and fn 4.

In addition, all the Courts of Appeals agree that a fair housing agency's need to expend resources for out-of-court remedial activities to counteract a defendant's discrimination is sufficient to establish Article III standing. As the Third Circuit (which petitioners characterize as a "strict approach" circuit) has explained:

> In deciding organizational standing questions after *Havens*, appellate courts have generally agreed that where an organization alleges or is able to show – depending on the stage of the proceeding – that it has devoted additional resources to some area of its effort in order to counteract discrimination, the organization has met the Article III standing requirement.

Fair Hous. Council of Suburban Philadelphia v. Montgomery Newspapers, 141 F.3d 71, 78 (3d Cir. 1998). The Sixth Circuit agreed with this assessment, observing that "the circuits generally agree that an organization meets Article III standing requirements where it can show that the defendant's alleged violations of the Fair Housing Act caused it to divert resources from other projects . . . to combat the alleged discrimination." Pet. App. 16a. Out-of-court remedial

activities necessary to counteract a defendant's discrimination are sufficient to establish standing even in the circuits that petitioners characterize as taking stricter views of organizational standing. *See Louisiana ACORN Fair Hous. v. LeBlanc*, 211 F.3d 298, 305 (5th Cir. 2001) ("[A]n organization could have standing if it had proven a drain on its resources resulting from counteracting the effects of the defendant's actions."), *cert. denied*, 532 U.S. 904 (2001); *Fair Housing Council of Suburban Philadelphia*, *supra*, 141 F.3d at 78 ("where an organization alleges or is able to show – depending on the stage of the proceeding – that it has devoted additional resources to some area of its effort in order to counteract discrimination, the organization has met the Article III standing requirement."); *Spann v. Colonial Village, Inc.*, *supra*, 899 F.2d at 27 (D.C. Cir. 1990) ("*Havens* makes clear that an organization establishes Article III injury if it alleges that purportedly illegal action increases the resources the group must devote to programs independent of its suit challenging the action.").

In this case respondent Fair Housing Council presented evidence of several out-of-court remedial activities, *see supra* pp. 6-7, that it believed were necessary to counteract WKB's non-compliant construction. The Court of Appeals expressly relied upon this evidence. Because there is no circuit court conflict on the question of whether a fair housing organization may establish standing based on the need to counteract a defendant's discrimination, the Council's standing in this case was determined on grounds on which all the circuits agree.

The petition asks this Court to resolve a conflict that does not apply to the facts at bar and should, accordingly, be denied.

B. WKB's Petition Mischaracterizes the Substantial Evidence of Agency Harm in this Case.

The evidence in this case suffices to prove standing under the standards of all circuits to have considered the question. In its attempt to suggest otherwise, WKB simply mischaracterizes the record below. Specifically, WKB asserts:

> There is no evidence in the record – not in any interrogatory response or deposition testimony – showing that FHC suffered some present tangible injury separate and apart from its costs to investigate and file this specific suit.

Pet. at 15. This statement conflicts squarely with the Sixth Circuit's findings (which the Petition nowhere directly challenges, likely because this Court does not grant review to correct allegedly erroneous factual findings in the lower courts). Specifically, the Sixth Circuit held:

> [W]e conclude that the Fair Housing Council set forth sufficient evidence to demonstrate that it *suffered an injury that is* both *independent of the instant litigation* and fairly traceable to the discriminatory actions of the Defendants.

Pet. App. 22a (emphasis supplied). The appellate court several times identified specific agency harms suffered

by FHC that were independent of the costs of litigation itself. Pet. App. 22a – 26a and fn 4.

Most notably, the Council conducted an extensive investigation of the Village of Olde St. Andrews. It visited and inspected the development; took and processed digital photos of the development; trained, supervised, and debriefed testers; conducted research into the ownership of the development; located and reviewed the original design plans and construction permits; and performed other tasks. Pet. App. 71a – 74a (Plaintiff's Responses to Defendants' First Interrogatories, No. 3); Pet App. 26a at fn 4. The Council determined that Olde St. Andrews was not accessible to persons with disabilities as required by the Fair Housing Act, and thereafter devoted additional resources to investigating WKB's other two developments, Greenhurst and Deer Creek, and determining that they too were non-compliant. *Id.*; *see also* Pet. App. 88a – 98a (Plaintiff's Responses to Defendants' First Interrogatories, No. 15).

FHC's Executive Director Tony Baize testified that the Council's work on WKB's non-compliant construction "diverted resources away from other projects to focus on this investigation." Pet. App. 125a – 129a. Specifically, the Council diverted resources from its normal activities, including: conducting, attending, and speaking at fair housing seminars; providing tester training; providing advice and referral services to the public; publishing the *National Fair Housing Advocate* and other publications; and postponing an insurance testing project. *Id.*; *see also* Pet. App. 68a – 74a (Plaintiff's Responses to Defendants' First Interrogatories, Nos. 2, 3).

In addition, after discovering WKB's non-compliance, the Council initiated several new projects to undo the damage to its mission caused by the inaccessibility of WKB's many housing projects. Pet. App. 71a – 74a (Plaintiff's Responses to Defendants' First Interrogatories, No. 3). It increased the number of its presentations at local and regional events specifically focused on disability issues, conducted additional accessibility tests, and recruited more testers with disabilities. *Id.* Generally, instead of focusing its limited resources on education and outreach in traditional areas like race and familial status discrimination, the Council "got a lot more involved with accessibility and getting the word out about accessibility in new construction." Pet. App. 130a (Baize Dep. at 48-49, 72). Baize estimated that the total economic harm to the Council was around $60,000. Pet. App. 122a – 123a (Baize Dep. at 33-34).

Finally, WKB's non-compliant dwelling units frustrated the Council's corporate mission to educate the community about the non-discrimination requirements of the Fair Housing Act, and to ensure full access to persons with disabilities. Pet. App. 116a – 119a (Baize Dep. at 27-30). The construction of non-compliant units sent the opposite message to the community, *i.e.*, that persons with disabilities "cannot have access to this new house even though [we told them] they should have access to it." Pet. App. 123a – 124a (Baize Dep. at 34-35). *See also* Pet. App. 68a (Plaintiff's Responses to Defendants' First Interrogatories, No. 2). As the *Havens* Court observed, "that the alleged injury results from the organization's noneconomic interest in encouraging open housing

does not affect the nature of the injury suffered." *Havens Realty Corp.*, 455 U.S. at 380 n. 20.

In sum, contrary to petitioners' assertion (Pet. 15-16), both lower courts found concrete proof of harm other than litigation expenses.

C. THE SIXTH CIRCUIT'S DECISION DOES NOT CONFLICT WITH THIS COURT'S ARTICLE III JURISPRUDENCE.

Petitioners devote several pages to the proposition that the decision below "dramatically expands" this Court's Article III standing jurisprudence and has the effect of conferring standing to virtually all fair housing organizations who spend time and money "to prepare lawsuits." Pet. 22 – 25. This is a transparent attempt to make this case appear to be a "taxpayer standing" case, such as *Flast v. Cohen*, 392 U.S. 83 (1968); *Daimler Chrysler Corp. v. Cuno*, 126 S. Ct. 1854 (2006); *Hein v. Freedom From Religion Foundation*, 127 S. Ct. 2553 (2007), or an environmental regulation case, such as *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992). Such cases all involve plaintiffs invoking their status as "taxpayers" or individuals[10] seeking to challenge the legality of some government action or inaction. In contrast, the case at bar involves a dispute between private parties, one of whom offered evidence of tangible harm to its operational activities; standing

[10] To the extent there were organizational plaintiffs involved in these cases, their standing was based solely on their representative capacity on behalf of their members, and not, as here, on any harm directly to their institutional interests.

here is governed by *Havens*, and, as shown, that test is easily satisfied.

Unlike *Flast* and its progeny, *Havens* is the progeny of a long line of fair housing standing cases going back to *Trafficante v. Metropolitan Life Ins. Co.*, 409 U.S. 205 (1972); *Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977); and *Gladstone Realtors v. Village of Bellwood*, 441 U.S. 91 (1979). Judge (now Justice) Ginsburg clearly distinguished the type of agency harm found in *Havens* from those suits "presenting only abstract concerns or complaints about government policy or conduct." *Spann v. Colonial Village, Inc.*, 899 F.2d at 30:

> The ideological or undifferentiated injury cases, unlike this case, characteristically are suits against the government to compel the state to take, or desist from taking, certain action. Such cases implicate most acutely the separation of powers, which . . . is the 'single basic idea' on which the Article III standing requirement is built. The standing barrier, as it operates in undifferentiated injury cases, prevents the courts from interfering in questions that 'our system of government leaves . . . to the political processes.'
>
> Plaintiffs here do not seek to compel government action, to involve the courts in a matter that could be resolved in the political branches, or simply 'to vindicate their own value preferences through the judicial process. Plaintiffs are private actors suing other private actors, traditional grist for the judicial mill.

> Their suit does not raise the concerns that may arise when a public agency or officer is sued to achieve change in a government policy. To the extent that plaintiffs seek to vindicate values, those values were endorsed by Congress in the Fair Housing Act, the enforcement of which Congress specifically left in the hands of private attorneys general.

Id. at 30-31 (citations omitted).

Havens clearly and unequivocally held that a fair housing organization, like the Council, which shows "concrete and demonstrable injury to the organization's activities" suffers far more than simply a setback to abstract social interests. 455 U.S. at 379. *Havens* controls the Article III analysis in this context, not the taxpayer standing cases. Unlike the abstract injury claimed by taxpayers who seek to compel some governmental action, the concrete injury suffered by the Council here included the diversion of tangible assets to identify and investigate the defendant's discriminatory conduct, and the expenditure of resources to counteract the harm to the agency's corporate mission. *See supra* pp. 6-7.[11]

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[11] WKB highlights the fact that respondent Council was a recipient of HUD funding during 1997 and 1998, Pet. 4-6, and claims that the use of such funds for generic "tester funding" obliterates the Council's agency harm, Pet. 24-25. But, as noted above, the Council's standing is not limited to its pre-litigation investigation activities, but also includes out-of-court remedial activities. Moreover, the Council's HUD grants were not limited to "tester funding," and could have been used for a vast array of other activities. *See generally* Pet. App. 82a – 85a. As the Court of Appeals noted, if the Council had not expended resources on its

II. THE SIXTH CIRCUIT'S APPLICATION OF THE FAIR HOUSING ACT'S STATUTE OF LIMITATIONS IS CORRECT. IN ANY EVENT, IT WOULD BE PREMATURE TO ADDRESS THE ISSUE IN THIS CASE.

Petitioners ask this Court to address the Sixth Circuit's application of the Fair Housing Act's statute of limitations on the ground that it was "wrong." Pet. 25.

A. Review of This Issue Is Premature.

It would be premature for the Court to review this question. Although some district courts have applied the FHA's statute of limitations to design and construction cases differently in varying contexts, *see* Pet. 29, the decision below was the first on the subject by any Court of Appeals. Only one other Court of Appeals has addressed the issue since the court below issued its decision. In *Garcia v. Brockway*, 2007 U.S. App. LEXIS 22428 (9th Cir. Sept. 27, 2007), the Ninth Circuit recently held that the Act's statute of limitations begins to run upon completion of construction of a non-compliant dwelling, regardless of the date of actual injury to a potential victim. A petition for rehearing has been filed in that case and remains pending. Thus, the issue has yet to recur with sufficient frequency to establish a mature conflict among the circuit courts of appeals.

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investigation of WKB, it could have used the same funds for other purposes consistent with its corporate mission. Pet. App. 24a. In any event, HUD was not the only source of the Council's funding. It also had funds from other sources. Pet. App. 142a – 145a.

Moreover, the issue is of limited relevance to this case. Two of the three housing developments at issue here – the Village of Olde St. Andrews and the Village of Deer Creek – are not affected by the statute of limitations. They were still under construction when the action was commenced. The district court's final remediation order must be complied with as to those developments, regardless of the outcome of the Court's ruling on this issue. Certiorari would not be appropriate to address an issue that will have limited applicability or will not affect the course of the underlying litigation. *Ticor Title Ins. Co. v. Brown*, 511 U.S. 117 (1994); *Smith v. Butler*, 366 U.S. 161 (1961).

B. The Decision Below Is Correct.

Contrary to petitioners' suggestion, Pet. 30-32, the ruling below is not inconsistent with either *National R.R. Passenger Corp. v. Morgan*, 536 U.S. 101 (2002), or *Ledbetter v. Goodyear Tire & Rubber Co., Inc.*, 127 S. Ct. 2162 (2007). Both of those decisions construed Title VII rather than the Fair Housing Act. Fair Housing Act cases are controlled by the statute of limitations holding of *Havens Realty*, which held that a claim challenging a "continuing violation" of the Act is timely filed if any of the defendant's unlawful behavior falls within the limitations period. 455 U.S. at 380-381. Where a plaintiff challenges not just one incident of unlawful conduct, but an unlawful *practice* that continues into the limitations period, the complaint is timely under the Act. *Id.* at 381.

The underlying rationales of *Morgan* and *Ledbetter* are consistent with *Havens* and with the Court of Appeals' decision below. In *Morgan* the Court held that

an unlawful discriminatory practice that continually affects the "conditions" of employment, such as a hostile work environment, is not barred by the statute of limitations so long as any act contributing to the hostile environment occurs within the limitations period. 536 U.S. at 116-117. In *Ledbetter* the Court emphasized that a statute of limitations does not begin to run until a cause of action "accrues," 127 S. Ct. at 2171 n. 3, which occurred in that case when the allegedly discriminatory act was "communicated to" the victim. *Id.* at 2169. According to *Ledbetter,* a cause of action accrues each time a discriminatory act occurs that is based on a "facially discriminatory pay structure," in contrast to claims that are based on "facially nondiscriminatory" pay systems. *Id.* at 2174.

The decision below is consistent with these principles. Like a "facially discriminatory pay structure" that triggers a new cause of action each time a paycheck is issued, a non-conforming dwelling unit is "facially discriminatory" against persons with disabilities,[12] and a new cause of action is triggered each time such a person attempts to buy or rent the dwelling. The Court of Appeals below was correct to focus on the date of last "sale or rental" of the facially discriminatory dwelling structure rather than on the date of its creation. Under *Havens*, because the last

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[12] "A person using a wheelchair is just as effectively excluded from the opportunity to live in a particular dwelling by the lack of access into a unit and by too narrow doorways as by a posted sign saying 'No Handicapped People Allowed.'" *Fair Housing Amendments Act of 1987: Hearings on S. 558 Before the Senate Subcomm. on the Constitution of the Comm. on the Judiciary*, 100th Cong. at 25 (1987); *accord* 134 Cong. Rec. S19720 (statement of Sen. Harkin).

"sale or rental" of a dwelling unit at Greenhurst occurred within the limitations period, all 156 non-conforming units at Greenhurst are part of the same "continuing violation" of the Act and are subject to judicial remedy. Moreover, *Ledbetter* instructs that a cause of action based upon a non-conforming dwelling unit cannot "accrue" until an injury has actually been visited upon the plaintiff-victim; before that moment there is no cause of action. Here the Council first became aware in 1999 that the non-conforming units at Greenhurst existed and were frustrating its corporate mission, and immediately amended its Complaint to include them in the suit.

Petitioners contend that the Act's statute of limitations must commence immediately upon completion of construction, Pet. 27, regardless of when a potential renter or buyer might first be exposed to the inaccessible units, and regardless of the "unavailability" of the units to persons with disabilities years later.

There are several reasons why the statute of limitations in design and construction cases cannot begin to run on the date of completion of construction. First, there is the language of the Act itself. The limitations provision in the Act provides:

> An aggrieved person may commence a civil action in an appropriate United States district court or State court not later than 2 years after the occurrence *or the termination of an alleged*

> *discriminatory housing practice, . . . whichever occurs last . . . .*

42 U.S.C. §3613(a)(1)(A) (emphasis added). This language makes no reference to the date of design or date of construction, but instead refers to the "termination" of a discriminatory housing "practice." So long as a multi-family dwelling unit covered by the Act remains non-compliant and inaccessible to persons with disabilities, the discriminatory "practice" has not "terminated" within the meaning of the Act. *See Havens,* 455 U.S. at 380-381 (where a plaintiff challenges not just one incident of unlawful conduct, but an unlawful practice that continues into the limitations period, the complaint is timely filed).[13]

Second, to the extent there is any ambiguity on this issue, the Act must be given "a generous construction" so that the Act carries out a "policy of the United States that Congress considered to be of the highest priority." *Trafficante v. Metropolitan Life Ins. Co.*, 409 U.S. 205, 209 (1972). This mandate for a generous construction by a unanimous Supreme Court has

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[13] Petitioners gloss over the straightforward limitations language in the Act and instead focus on what they term the "more specific" building construction requirements of 42 U.S.C. §3604(f)(3) over the "more general" prohibitions on discrimination found in 42 U.S.C. §3604(f)(1). Pet. 26-28. But even a cursory review of the Act's structure reveals that the accessibility requirements set forth in §3604(f)(3) are merely illustrative "examples" of several kinds of behavior that constitute discrimination in the "sale or rental" of dwellings prohibited by §3604(f)(1). The limitations language must be construed to apply to the actual prescriptive language of §3604(f)(1), not merely the illustrations set forth in §3604(f)(3).

become the foundation for all subsequent judicial interpretations of the Fair Housing Act. *See Havens Realty Corp. v. Coleman*, 455 U.S. at 380 (unanimous recognition of "the broad remedial intent of Congress" embodied in the Act); *City of Edmonds v. Oxford House, Inc.*, 514 U.S. 725, 732 (1995) (reaffirming *Trafficante*'s recognition of the Act's "broad and inclusive compass" and its entitlement to a "generous construction").

Third, the policy reason for statutes of limitations is not advanced by a "completion of construction" trigger. The purpose of statutes of limitation is to keep stale claims out of the courts. *Havens Realty Corp.*, 455 U.S. at 380. "Where the challenged violation is a continuing one, the staleness concern disappears." *Id.* In a non-compliant construction situation, the non-compliance is continuous, open, obvious, and easily determinable so long as the structure continues to remain non-compliant. There is no danger of stale evidence.

If the accessibility violations at Greenhurst are allowed to persist because construction of the dwelling units was "completed" more than two years prior to this litigation, WKB's construction will "effectively deprive disabled individuals of accessible housing." *U.S. v. Edward Rose & Sons*, 246 F. Supp. 2d 744, 754 (E.D. Mich. 2003), *aff'd*, 384 F.3d 258 (6th Cir. 2004). This could not have been the intent of Congress in enacting the design and construction provisions of the Fair Housing Amendments Act.

There is no substantial appellate conflict on the statute of limitations question, and a decision on the

issue will not resolve this case. Moreover, the Court of Appeals' ruling on this issue was correct.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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